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No. 90-1802

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
and NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Association of Independent Insurers ("NAII") respectfully moves this Court for leave to file the accompanying brief in support of Petitioners in this case as *amicus curiae*. The NAII has requested the written consent of each party to the filing of the accompanying brief. Such written consents were not provided.

1. NAII is one of the largest associations of property and casualty insurers in the United States. The NAII is presently composed of approximately 550 member companies which provide property and casualty insurance in the national market. These companies write $54.6 billion in premiums representing 25 percent of all property and casualty insurance written in the United States. They employ all types of marketing systems: telemarketing, direct writers, captive agents, and independent agents.

2. a. This case addresses the definition of the term "employee" contained in § 3(6) of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6) (1988). Specifically, this case concerns whether the term employee, for purposes of ERISA, includes within its scope captive independent-contractor insurance agents and other individuals who work in a relationship that, by traditional common-law tests, would be characterized as independent contractors. Additionally, this case, by implication, concerns the question of whether certain individuals, who under traditional standards would be characterized as employees, for purposes of ERISA would not be employees.

b. The Fourth Circuit's test for employee status under ERISA is dramatically different from the common-law test, which has been adopted by all other federal appellate courts that have addressed the issue. *Cf. Penn v. Howe-Baker Engineers, Inc.*, 899 F.2d 1096 (5th Cir. 1990); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987); *Wolcott v. Nationwide*, 884 F.2d 245 (6th Cir. 1989).

c. The Fourth Circuit's test consists of three conjunctive elements: an expectation element, a reliance element, and a bargaining power element. By virtue of this test's overall disregard of factors associated with the work relationship, and emphasis on factors exogenous to such relationship, some individuals who under the traditional common-law test are employees would not be entitled to ERISA protection. Obversely, many who under the common-law test are *not* employees would be covered under ERISA. The practical consequence of the Fourth Circuit's definition is to substitute for the class of persons Congress intended to be covered by ERISA a class of the Fourth Circuit's own creation.

d. The Fourth Circuit's test is wholly irreconcilable with the decision of this Court that the Fourth Circuit cites in support of its test. *See, United States v. Silk*, 331 U.S. 704 (1947). Whereas in *Silk* this Court crafted a definition of the term employee that closely resembles the common-law test, the definition devised by the Fourth Circuit is radically different. Such test is a product of the Fourth Circuit 1) misapplying the clearly-enunciated rules set forth by this Court in *Silk*, and 2) misconstruing the purpose Congress sought to achieve in enacting ERISA. In addition, the Fourth Circuit's test is inherently unworkable.

e. By this Court restoring the traditional common-law definition of employee for purposes of ERISA, the correct meaning would be given to the term Congress used to describe the class of persons to be included within the ambit of ERISA. Moreover, doing so would restore consistency between the definition of that term and the legislative history accompanying the enactment of ERISA, which states that the term "employee" was intended to have the same meaning as it does in collective bargaining agreements. H. Rep. No. 533, 93d Cong., 1st Sess. 10 (1973). Additionally, adoption of the common-law test would reaffirm this Court's reasoning in *Silk*.

3. Inasmuch as NAII-member companies rely almost exclusively on agents of one of the types noted in paragraph 1, *supra*, to market their products, and in some cases maintain a compensation arrangement with such

agents that provides for some element of compensation to be paid the agent in a year subsequent to the particular year in which the insurer's product is sold, the Court's decision in this case will have a substantial impact on NAII members. Consequently, the NAII has a special and direct interest in the outcome of this case.

WHEREFORE, it is respectfully requested that the National Association of Independent Insurers' motion for leave to file the accompanying brief *amicus curiae* in support of the Petitioners in this case be granted.

Respectfully submitted,

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BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, the National Association of Independent Insurers ("NAII") respectfully submits this brief in support of Petitioners in this case as *amicus curiae*. NAII is one of the largest associations of property and casualty insurers in the United States. The NAII is presently composed of approximately 550 member companies which provide property and casualty insurance in the national market. These companies write $54.6 billion in premiums representing 25 percent of all property and casualty insurance written in the United States. They employ all types of

marketing systems: telemarketing, direct writers, captive agents, and independent agents.

SUMMARY OF ARGUMENT

This case addresses the definition of the term "employee" contained in § 3(6) of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), 29 U.S.C. § 1002(6) (1988). Specifically, this case concerns whether the term employee, for purposes of ERISA, includes within its scope captive independent contractor insurance agents and other individuals who work in a relationship that, by traditional common-law tests, would be characterized as independent contractors. Additionally, this case, by implication, concerns the question of whether certain individuals, who by traditional standards would be characterized as employees, for purposes of ERISA would not be employees.

The Fourth Circuit's test for employee status under ERISA is dramatically different from the common-law test, which has been adopted by all other federal appellate courts that have addressed the issue. *Cf. Penn v. Howe-Baker Engineers, Inc.*, 899 F.2d 1096 (5th Cir. 1990); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987); *Wolcott v. Nationwide*, 884 F.2d 245 (6th Cir. 1989).

The Fourth Circuit's test consists of three conjunctive elements: an expectation element, a reliance element, and a bargaining power element. By virtue of this test's overall disregard of factors associated with the work relationship, and emphasis on factors exogenous to such relationship, some individuals who under the traditional common-law test are employees would not be covered by ERISA. Obversely, many who under the common-law test are not employees would be covered by ERISA. The practical consequence of the Fourth Circuit's definition is to substitute for the class of persons Congress intended to be covered by ERISA a class of the Fourth Circuit's own creation.

The Fourth Circuit's test is wholly irreconcilable with the decision of this Court that the Fourth Circuit cites as support for its test. *See, United States v. Silk*, 331 U.S. 704 (1947). Whereas in *Silk* this Court crafted a definition of the term employee that closely resembles the common-law test, the definition devised by the Fourth Circuit is radically different. Such test is a product of the Fourth Circuit 1) misapplying the clearly-enunciated rules set forth by this Court in *Silk*, and 2) misconstruing the meaning and the purpose Congress sought to achieve in enacting ERISA. In addition, the Fourth Circuit's test is inherently unworkable.

By this Court restoring the traditional common-law definition of employee for purposes of ERISA, the correct meaning would be given to the term Congress used to describe the class of persons to be included within the ambit of ERISA. Moreover, doing so would restore consistency between the definition of that term and the legislative history accompanying the enactment of ERISA, which states that the term employee was intended to have the same meaning as it has in collective bargaining agreements. H. Rep. No. 533, 93d Cong., 1st Sess. 10 (1973). Additionally, adoption of the common-law test would reaffirm this Court's reasoning in *Silk*.

Inasmuch as NAII-member companies rely almost exclusively on agents of one of the types noted above to market their products, and in some cases maintain a compensation arrangement with such agents that provides for some element of compensation to be paid the agent in a year subsequent to the particular year in which the insurer's product is sold, the Court's decision in this case will have substantial impact on the NAII membership.

Consequently, NAII has a special and direct interest in the outcome of this case. NAII respectfully submits that, in light of the historically-recognized meaning of the term employee, and the interpretation of that term which this Court has adopted in its prior decisions, the traditional common-law test should be adopted for defining employee for purposes of ERISA.

ARGUMENT

I

The term employee is a cornerstone of the ERISA statute, inasmuch as that term establishes an individual's eligibility to the protections of that statute, and right to institute an action seeking recovery of benefits under a plan covered by ERISA if such benefits are denied. Under ERISA § 502(a), 29 U.S.C. § 1132(a), an action for recovery can be maintained only by a participant (or a beneficiary). Moreover, an individual must first be an employee before being eligible to become a participant. ERISA § 3(7), 29 U.S.C. § 1002(7). Thus, in order to bring an action to recover benefits due under an ERISA plan, an individual (other than a beneficiary) must either be, or have been, an employee.

Under the traditional common-law definition, an individual is an employee if the service recipient has the right to control and direct the individual as to both the result to be accomplished and the details and means by which the result is to be accomplished. *E.g., New Orleans M. & C. Railroad Co. v. Hanning*, 15 Wall. 649, 656 (1872); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889). The determination of whether an individual is an employee under the common-law test is generally based on an analysis of several key factors.[1]

[1] E.g., Restatement (Second) of Agency § 220(2) (1958) sets forth the following ten factors: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in business. Similarly, the Internal Revenue Service has devised a twenty-factor test for determining employee status under the common-law. Under such test, factors indicative of employee status include whether individuals: (1) must comply with employer's instructions about the work; (2) receive training from or at the direction of the employer; (3) provide services that are integrated into the business; (4) provide services that must be rendered personally; (5) hire, supervise, and pay assistants for the employer; (6) have a continuing working relationship with the employer; (7) must follow set hours of work; (8) work full-time for an employer; (9) do their work on the employer's premises; (10) must do their work in a sequence set by the employer; (11) must submit regular reports to the employer; (12) receive payments of regular amounts at set intervals; (13) receive payments for business and/or travel expenses; (14) rely on the employer to furnish tools and materials; (15) lack a major investment in facilities used to perform the service; (16) cannot make a profit or suffer a loss from their services; (17) work for one employer at a time; (18) do not offer their services to the general public; (19) can be fired by the employer; and (20) may quit work at any time without incurring liability. I.R. Manual, Ch. 4600 Employment Tax Procedures, Ex. 4640-1.

The Fourth Circuit's test for employee status under ERISA is dramatically different from the common-law test, which has been adopted by all other federal appellate courts that have addressed the issue. *Cf. Penn v. Howe-Baker Engineers, Inc.*, 899 F.2d 1096 (5th Cir. 1990); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Holt v. Winpisinger*, 811 F.2d 1532

(D.C. Cir. 1987). Where a test similar to that adopted by the Fourth Circuit was adopted at the district court level within the Sixth Circuit, such test was rejected by the Sixth Circuit Court of Appeals. *Wolcott v. Nationwide*, 884 F.2d 245 (6th Cir. 1989). *aff'g in part and rev'g in part*, 664 F.Supp. 1533 (S.D. Ohio 1987).

The novel and unorthodox test for determining employee status developed by the Fourth Circuit consists of three conjunctive elements: an expectation element, a reliance element, and a bargaining-power element. As is evident, the Fourth Circuit's test departs significantly from the common-law test.

The Fourth Circuit's test would provide ERISA coverage to some common-law independent contractors, while denying ERISA coverage to some common-law employees. This anomalous result is attributable to the Fourth Circuit test's diminished regard for factors associated with the work relationship, while emphasizing factors outside of such relationship.

The Fourth Circuit's test, briefly stated, requires that:

1. the sponsor of the "pension plan" has taken some action that created a reasonable expectation on the individual's part that benefits would be paid in the future;

2. the individual manifests reliance on that expectation by a) remaining for "long years" in the "employer's" service, *and* b) foregoing other significant means of providing for his or her retirement; and

3. the individual lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits.

Darden v. Nationwide Mutual Insurance Company, 796 F.2d 701, 706 (1986). The Fourth Circuit's test reflects

the contract-law concept of promissory estoppel.[2] *See generally* 17A Am Jur 2d. Contracts § 120. The relevance of that contract-law concept to the definition of employee for purposes of ERISA is remote at best. It is respectfully submitted that the transmutation of the term employee into a contract-law promissory estoppel test is supportable only if the statute subject to interpretation contains express language to support such interpretation. No such language is apparent in ERISA.

II

The Fourth Circuit's test is seemingly derived from its interpretation of this Court's decision in *United States v. Silk*, 331 U.S. 704 (1947). Although the Fourth Circuit also cited *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) as authority for such test, it is submitted that, as this Court observed in *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968), the Congress repudiated that decision by enacting an amendment that expressly excludes from the definition of employee anyone having the status of independent contractor. The Court stated in *United Insur. Co. of America* that the "obvious purpose of [the aforementioned] amendment was to have . . . general agency principles [apply] in distinguishing between employees and independent contractors." 390 U.S. at 256. Hence, the Fourth Circuit's reliance on the *Hearst Publications* decision for guidance in interpreting the term employee for ERISA purposes is highly questionable.

The portion of the *Silk* decision that the Fourth Circuit found dispositive of how the term employee should be interpreted for purposes of ERISA is:

> [t]he word "employee" . . . [in the context of a particular federal statute is] to be construed "in the

[2] Within the context of contract law, the doctrine of promissory estoppel provides that a promise becomes binding if the promisee suffers detriment in reliance on such promise, notwithstanding that such detriment was not requested by the promisor as consideration.

> light of the mischief to be corrected and the end to be attained."

331 U.S. at 713, citing *NLRB v. Hearst Publications*, 322 U.S. 111. The Fourth Circuit's application of the foregoing rule, the so-called "economic reality test," in crafting its definition of employee under ERISA was improper for two reasons. First, the Fourth Circuit applied the economic reality test concept in an extreme and exaggerated manner, completely ignoring the countervailing qualifications reiterated by this Court in *Silk* several times. Second, the Fourth Circuit's definition of employee would subvert the very stated intent that it relied on to support its definition.

A. Fourth Circuit's Test Is Irreconcilable With *Silk*

The countervailing considerations that this Court admonished in *Silk* should be taken into account—in addition to the above quoted passage—are:

> [of] course, this does not mean that all who render service to an industry are employees . . . . Obviously . . . [t]he distributor who undertakes to market at his own risk the product of another, or the producer who agrees so to manufacture for another, ordinarily cannot be said to have the employer-employee relationship.

331 U.S. at 712 (citations omitted). Indeed, the foregoing passage indicates that "obviously" a distributor—such as an insurance agent—who undertakes to market at his own risk the product of another—such as the insurance product of another—cannot be said to have the employee-employer relationship. This Court also stated:

> of course, [permitting courts to take into account legislative intent in defining "employee"] does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the

> man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution.

331 U.S. at 714. The foregoing passage illustrates this Court's acknowledgement that while the common-law definition of "employee" can be contoured to effectuate the end sought to be achieved by a particular statute, the basic common-law test approach cannot be abandoned, unless Congress has manifested an intent to "change normal business relations." It is respectfully submitted that such a manifestation does not exist in ERISA. Finally, the Court in *Silk*, assured that:

> [c]ertainly the industry's right to control how "work shall be done" is a factor in the determination of whether the worker is an employee or independent contractor.

331 U.S. at 714. Inasmuch as control is the hallmark of the common-law test, by this passage the Court is simply reiterating the continued applicability of the common-law test—albeit to be applied in the context of the statute's remedial purpose.

The foregoing passages, while set forth in *Silk*, were omitted from the Fourth Circuit's opinion. Clearly, these statements in *Silk* reveal this Court's intent that the underlying purpose of a statute being interpreted is to be taken into account in defining "employee," only to the extent that such can be done without departing from the basic, historically-recognized, common-law underpinnings of employee status. The Fourth Circuit's definition of an employee fails to adhere to the teachings of *Silk* by ignoring these countervailing considerations.

The Fourth Circuit's erroneous application of the *Silk* rule of interpretation is most apparent by the fact that in *Silk* the Court's definition of "employee" is, in sub-

stance, an application of the common-law test,[3] whereas the Fourth Circuit's test represents a complete abandonment of the common-law test. In *Silk*, this Court ruled that examples of factors that should be considered to "define the limits of the employer-employee relationship" include: degree of control, opportunities for profit or loss, investment in facilities, permanency of relationship and skill required. 331 U.S. at 716. A comparison of the factors enumerated in *Silk* with the examples of common-law factors set forth *supra* at note 1, reveals that each and every one of the *Silk* factors is a common-law factor. Moreover, the fact that this Court stated in *Silk* that the factors it enumerated do not constitute a complete list, *id.*, together with the countervailing considerations it set forth that are discussed above, make it self-evident that in *Silk* this Court adopted in substance the common-law test. Indeed, *Silk*'s progeny has reaffirmed this interpretation. *E.g., Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216 (Ct. Cl. 1965).

In contrast, none of the three elements of the Fourth Circuit's test can be found among the common-law factors. *Cf. supra* note 1. In this regard, a comparison of *Silk* with *Hearst Publications* reveals that *Silk*, which remains valid, while giving deference to the statute's purpose, acknowledged that the traditional concept of employee status could not be ignored. In *Hearst Publications*, which was effectively repudiated by Congressional action, the Court took the position that "the ends sought to be accomplished by the legislation . . . *may outweigh* technical legal classification," 322 U.S. at 128 (emphasis added), thereby enabling statutory purpose to swallow up and nullify any terms of the statute whose effect would be to so limit the scope of a statute's pur-

[3] In *Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216, 225 (Ct. Cl. 1965), this Court's decision in *Silk* was viewed by the Court of Claims as "obviously consistent with established common-law principles of control."

view as to arguably conflict with the statute's purposes.[4] It is submitted that the Fourth Circuit's test follows, or perhaps goes even farther afield than, the approach taken in *Hearst Publications*. Such test is clearly in conflict with the teachings of *Silk*. The distinction between these two analytical approaches to defining employee status was perhaps best stated by the Court of Claims, after an exhaustive analysis of *Silk*, its history and its progeny:

> [t]he conclusion to be drawn from the foregoing is that the existence or absence of an employment relationship is to be ascertained not by use of the economic reality test but by applying the common-law rules realistically.

353 F.2d at 228. In other words, in defining employee for purposes of a particular statute, statutory purpose should not itself define employe, but rather should provide the context that influences, not overrides, the application of the common-law rules.

As Congress demonstrated by its repudiation of the *Hearst Publications* decision, if Congress intends for a statute to apply to any individual who might arguably be in a position to benefit from the broad purpose espoused by such statute, the statute would not contain terms with historically-recognized meaning to define the class of individuals to be covered by the legislation. Since ERISA clearly limits the class of individuals who are

[4] Although the *Silk* decision cites *Hearst Publications* for the proposition that statutory terms, such as "employee," should be interpreted in a manner that effectuates statutory purpose, the decisions in each of those cases evidence the economic realities test concept being applied with different vigor. *Silk* represents a much more restrained application of that concept than *Hearst Publications*. It is submitted that the disparate degrees of restraint that was exercised by the Court in applying the economic realties test concept in each case is the critical distinguishing feature of those decisions, and perhaps explains why Congress repudiated *Hearst Publications*, but permitted *Silk* to remain efficacious.

eligible to maintain an action seeking benefits under an ERISA plan, ERISA § 502(a), 29 U.S.C. 1132(a), individuals outside of that class should not be deemed eligible to maintain such an action, unless a specific exception can be found within the statute that would permit eligibility to be bestowed upon such individuals.

B. Fourth Circuit's Test Misconstrues Purpose of ERISA

A further fatal flaw in the Fourth Circuit's reasoning involves its interpretation of what Congress sought to achieve in enacting ERISA. The specific language of ERISA, relating to its purpose, that was cited by the Fourth Circuit as the basis for its definition of employee is:

> Congress was concerned that "many *employees* with long years of *employment* are losing anticipated retirement benefits." Because *employee* benefit plans "have become an important factor affecting the stability of *employment* and the successful development of industrial relations," Congress felt that it was desirable in the interests of the free flow of commerce, as well as in the interests of individual *employees* and their beneficiaries, to enact minimum standards "assuring the equitable character of such plans and their financial soundness."

796 F.2d 706 (quoting in part ERISA § 2, 29 U.S.C. § 1001) (emphasis added). The use of the term "employee," or a derivative thereof, in the foregoing passage serves to describe the class of persons entitled to protection under the Act.

The Fourth Circuit's definition of employee, however, gives absolutely no deference to that class description, but rather substitutes one of its own. The quoted language sets forth the express concerns that Congress sought to redress by enacting ERISA, which were that "many employees . . . are losing anticipated retirement benefits."

The Fourth Circuit interpreted that sentence as describing a protected class consisting of any individual who:

1. anticipates receiving retirement benefits;
2. relies on the expectation of receiving such retirement benefits; and
3. lacked sufficient bargaining power to obtain nonforfeitable contract rights to the retirement benefits.

796 F.2d at 706-707. The Fourth Circuit's attempt to define ERISA's protected class by "taking into account" ERISA's broad policy objective nowhere acknowledges the class that Congress identified in ERISA's purpose clause, ERISA § 2, 29 U.S.C. § 1001, and described in the statute as the only individuals (other than beneficiaries) who are eligible to maintain an action under ERISA seeking recovery of benefits owed under an ERISA plan, ERISA § 502(a), 29 U.S.C. §§ 1132(a). Instead, these three elements reflect only statutory purposes. This approach violates the teachings of *Silk*, that statutory purpose should not do more than influence the application of common-law rules for defining employee status. In light of the response of Congress to a similar approach taken in *Hearst Publications*, where statutory purpose was elevated over the common-law rules, it is respectfully submitted that this Court repudiate the Fourth Circuit's definition of employee.

III

Fourth Circuit's Test Is Unworkable

In addition to the conceptual deficiencies of the Fourth Circuit's test, such test also is patently unworkable. From a practical standpoint, in an action brought by an individual seeking benefits due under a plan covered by ERISA, the first element of the Fourth Circuit test will almost always be satisfied by common-law employees and

independent contractors, alike. Similarly, in such cases, the third element would not be satisfied only on rare occasions. It is the second element that generally would be dispositive of a worker's status.

The first element of the Fourth Circuit's test requires in substance only that the participants harbor some expectation that what is promised will be delivered. Likewise, with respect to the third element, it is respectfully submitted that situations where the bargaining strength of a particular individual is on par with or greater than that of the collective business are extremely rare. Moreover, it is submitted that individuals who possess this much bargaining power would likely also not satisfy the second element.

The second element generally would be dispositive of an individual's status. Such element, it is submitted, constitutes bad policy, is conceptually deficient and is unworkable. The second requirement of the second element is where the principal problem lies. It requires the demonstration of the existence or absence of other significant means of providing for retirement.

From a policy standpoint, it is submitted that such a requirement is inadvisable, inasmuch as it rewards irresponsibility, and punishes prudent retirement planning or the acquisition of substantial assets from means other than an individual's business. In addition, it penalizes younger or single individuals who empirically are less likely to focus on retirement needs.

The primary conceptual deficiency of this requirement is that it permits an individual's status to turn on a factor over which the individual has total control—thereby eliminating the interest and concerns of the service-recipient from the relationship.

While the instant case involves an individual seeking employee status under ERISA, this Court should be mindful of the other instances where an individual's best

interest would be served by remaining outside the ambit of ERISA. A stark illustration of the latter would be an individual who seeks the application of state-law remedies, such as punitive damages, incident to a claim being brought with respect to a plan. Such state-law remedies generally are not available if the particular matter is within the scope of ERISA. *See, Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). Thus, the definition of employee for purposes of ERISA is inherently susceptible to abuse, by virtue of there being some instances where employee status for purposes of ERISA would be desirable, and others where such status would be undesirable.

Defining employee status in a way that provides the individual unilateral control over a key factor of the definition is not supportable. Congress nowhere indicates such an intent in the ERISA statute. It is submitted that to provide an individual almost total unilateral control over his status in effect encourages that individual to arrange his or her affairs to either obtain or avoid ERISA protection, whichever appears more advantageous to the person at a particular time. Such flexibility would not be limited to common-law independent contractors; it would also extend to common-law employees. Indeed, the second element of the Fourth Circuit's test could result in two individuals with identical work relationships, that is, with one business and the rendering of identical services, being treated differently under ERISA, solely on the basis of differing approaches to their individual retirement planning.

The fact that the Fourth Circuit's test is not workable is apparent from the lengthy dispute in which the instant parties became ensnarled during the appeal. The issue was whether Darden owned sufficient assets, other than the Nationwide deferred compensation plan, of a "retirement" character, as to demonstrate his lack of reliance on the company's deferred compensation plan to provide for

his retirement security. Defendants-Appellants' opening appellate court brief (filed November 13, 1989) at 32-38; Plaintiff-Appellee's opening appellate Court brief (filed December 15, 1989) at 10-24. The Fourth Circuit test would demand that service recipients, and courts ascertain 1) the character, that is, retirement or non-retirement, of each asset that an individual possesses at a particular time, and, 2) of those assets determined to be of "retirement character," the individual's motivation for acquiring *each and every* one of those assets. Such determinations, it is submitted, approach the metaphysical.

A further unworkable aspect of the Fourth Circuit's test is that in order for a plan sponsor to determine the status of plan participants, the sponsor would need to collect and analyze information concerning the retirement arrangements established by each and every person participating in the plan. Moreover, since an individual's financial planning should, and frequently does, change over time, a plan sponsor would need to undertake such studies on a continuing basis.

IV

It is respectfully submitted that for purposes of ERISA, an employee should be defined under the common-law test. Defining the term employee in ERISA according to the common-law definition eliminates several inconsistencies, and brings harmony to the employee-independent contractor distinction as recognized virtually universally in the statutory and the common law. More importantly, however, adopting the common-law definition would restore to the term employee its historically-recognized definition, and would comport with the Congressional intent manifested by the legislative history accompaning the enactment of ERISA.

As noted, ERISA defines "employee" as "any individual employed by an employer." ERISA § 3(6), 29 U.S.C. 1002(6). Implicit in this statutory definition is a work relationship—not a contract-law concept. Thus, a departure from the common-law definition is justifiable only by demonstrating a statutory basis for doing so. Indeed, according to a recognized treatise on statutory construction:

> [t]o ignore a definition section is to refuse to give legal effect to a part of the statutory law. . . . To hold that the "words of the act" [that is, statutory purpose] control the definition section is to declare that the legislative intent is exactly the opposite of that declared by the legislature. . . . The legislature is the primary law-making authority and should be able to declare the law in any form it chooses as long as it is clearly expressed.

Sutherland Stat. Const. § 27.02 (4th Ed. 1989). Hence, the conventional principles of statutory construction would support an interpretation of the term employee that was consonant with its true meaning, that is, a description of a particular type of work relationship. To interpret the term employee as a contract-law promissory estoppel-type requirement, as the Fourth Circuit did, would, it is submitted, clearly violate this principle of statutory construction.

A common-law definition of employee would comport with the legislative history of ERISA, which provides:

> the definition "employee" is intended to encompass any person who has the status of an "employee" under a collective bargaining agreement.

H. Rep. No. 533, 93rd Cong., 1st Sess. 10 (1973). As manifest by this Court's decision in *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968), when Congress in 1947 amended the Labor-Management Relations Act, 1947, ("LMRA") 29 U.S.C. § 141 *et seq.*,

to specifically exclude independent contractors from the definition of employee, at 29 U.S.C. § 152(3), its purpose was to ensure that "general agency principles [be applied] in distinguishing between employees and independent contractors" under LMRA. 390 U.S. at 255-56. Inasmuch as LMRA is the principal federal statute for regulating collective bargaining arrangements,[5] the guidance provided by the aforesaid House Report on ERISA represents a clear intention that common-law principles were intended to be applied in determining employee status under ERISA.

A common-law definition of employee would be consistent with the definition of employee adopted by The Department of Labor ("DOL"), in a recent opinion letter. U.S. Department of Labor Advisory Opinion 91-17A (April 5, 1991). The interpretation adopted by the DOL clearly evidences the *Silk* reasoning, as opposed to the *Hearst Publications* reasoning. The definition set forth in the DOL opinion letter also illustrates how the remedial purposes of ERISA can be achieved within the parameters of the traditional common-law test.

Finally, by reaffirming the preeminence of the common-law test, and rejecting the approach taken by the Fourth

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[5] *See*, 29 U.S.C. § 141, *See, e.g. NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-402 (1952); *NLRB v. Pennsylvania Greyhound Lines, Inc.* 3033 U.S. 261, 266-68 (1938). Furthermore, according to a treatise on the subject of collection bargaining:

> The passage of the Labor Management Relations Act of 1947 confirmed the policy first endorsed in the Wagner Act of 1935 and made unmistakable the public's continued commitment to collective bargaining and the protetcion of workers' rights to organize "for the purpose of negotiating the terms and conditions of their employment." Further, *through the act, the federal government assumed almost full responsibility for regulating* unions' activities and *collective bargaining* except where these related to purely local affairs.

N. Chamberlain & J. Kuhn, *Collective Bargaining* 46 (2d Ed 1965) (emphasis added).

Circuit in devising its own definition of ERISA's protected class, this Court would aid in mitigating the confusion that would otherwise be worsened for all industries with respect to the determination of a worker's status for purposes of ERISA. It is submitted that unless Congress expressly manifests an intent that a term rich with historical definition, such as the term employee, is to be defined in a novel way, courts should be discouraged from abandoning the term's historical definition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should reverse the decision of the Fourth Circuit Court of Appeals, insofar as it defines the term employee for purposes of ERISA under the novel three-part test, and in its place adopt the common-law test.

Respectfully submitted,

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